

NOTICE: THIS AGREEMENT IS NON-NEGOTIABLE

**2007 INCITE PROGRAM USER AGREEMENT
NON-PROPRIETARY**

No. _____

THIS AGREEMENT, entered into this _____ day of _____, _____, by and between _____, (hereinafter called "**Contractor**" or "**Facility Operator**"), managing the _____ National Laboratory under Prime Contract No. _____ with the **UNITED STATES OF AMERICA** (hereinafter called the "Government"), as represented by the **UNITED STATES DEPARTMENT OF ENERGY** (hereinafter called "DOE"), and _____ (hereinafter called the "User"):

SPECIAL NOTICE CONCERNING PROTECTION OF INFORMATION AND INFORMATION SYSTEMS

The _____ (name of user facility) has implemented controls for protecting non-sensitive unclassified (fundamental research) information based on the NIST 800-53 "Low Baselines and Compensatory Controls". Risk is currently mitigated using available enterprise infrastructure and network-based tools to provide perimeter protection and vulnerability resolution. System and application-level security controls are implemented according to industry and federal best practices. All non-temporary user data resides on centralized file and archival storage systems that are regularly backed up. This data is protected and segmented from other users using standard access controls.

It is the sole responsibility of the _____ (name of user facility) user to identify the type of information that is to be processed (e.g., sensitive or non-sensitive) and to notify the _____ (name of user facility) of any specific data protection requirements beyond the currently implemented protections. The _____ (name of user facility) cannot guarantee that risks to preserving the CIA of information stored on its systems are zero, hence requests for processing data that is of a sufficiently sensitive (e.g., proprietary or export controlled) nature are not encouraged. Information sensitivity concerns apply to the purpose and intent of the research, the loading and execution of application software, input data for the application software, output data generated by the application software, and any data resulting from analysis of output data. If, for example, the application software has an export control classification number (ECCN), prospective users should acknowledge this fact along with giving the ECCN.

ARTICLE I — SCOPE OF SERVICES

Subject to the terms and conditions set forth below, the Contractor shall make available to designated employees or representatives (hereinafter referred to as "Participants," individually or collectively, as the context suggests) of User certain facilities, equipment, services, information

and/or material (hereinafter referred to as the "Activity") as described in Appendix A, which is attached hereto and hereby made a part of this Agreement.

ARTICLE II — COSTS

Upon request by User and at the Contractor's discretion, limited support services may be provided to the User. Should such support be provided, the Contractor will retain its employees assigned to User support functions on its payroll, and costs associated with the User support services will be paid by the User to the account of DOE in accordance with DOE's pricing policy, which will be provided to the User when applicable.

ARTICLE III — BILLING

The Contractor will invoice the User for the appropriate level of activity as defined in Appendix A, at the intervals and to the billing address specified therein. Each such invoice shall be paid promptly by User upon receipt and in accordance with instructions furnished therewith.

ARTICLE IV — ADMISSION; PERSONNEL RELATIONSHIPS

- A. Each admission or readmission of a Participant to the Activity under this Agreement shall be subject to and implemented under the applicable admission regulations and procedures of the Contractor and DOE. Each Participant shall execute Appendix B, which is attached hereto and made a part of this Agreement, and deliver it to the Contractor on or before admission to the Activity.
- B. Participants shall be considered employees or representatives of User during all activities under this Agreement and shall not be considered employees of the Contractor or DOE for any purpose. However, the occupational activities of Participants shall be subject to the administrative and technical oversight of the Contractor during and in connection with such participation in the Activity, and the Participants shall therefore abide by and comply with all applicable rules, regulations and requirements of the Contractor and DOE with regard to such Activity including, but not limited to, those pertaining to security, safety, operating and health-physics procedures, environmental protection, access to information, hours of work, computer security and conduct. User shall obtain such agreements from each Participant as necessary to implement the provisions of this Agreement.
- C. "Admission" shall be construed to include both physical access to the Contractor site and remote access by electronic means.
- D. For activities that involve Contractor computers, data storage systems, or communication networks, all Participants must comply with the Contractor Computer Use Policy, which is available on the Contractor's website. **THE USE OF CONTRACTOR RESOURCES TO STORE, MANIPULATE, OR REMOTELY ACCESS ANY NATIONAL SECURITY INFORMATION IS EXPRESSLY PROHIBITED.** This includes, but is not limited to, classified information, unclassified controlled nuclear information (UCNI), naval nuclear propulsion information (NNPL), the design or development of nuclear, radiological, biological, or chemical weapons or of any weapons of mass destruction. DOE and

Contractor shall have the unrestricted right to inspect all codes and data to ensure compliance with this clause.

ARTICLE V — SCHEDULING

The User understands and agrees (a) that the Activity is subject to the priority of the Contractor's work for the Government and on a nonpriority basis in regard to other users, and (b) that the Contractor, through its cognizant user facility administrator, shall have sole responsibility and discretion for allocating and scheduling usage of the facilities, equipment, services, materials and/or information needed for or involved in the Activity.

ARTICLE VI — MATERIALS

It is recognized that any material to be supplied by the User may be damaged, consumed, or lost. Materials (including residues and/or other contaminated material) remaining after performance of the work or analysis will be removed in their then condition by the User at the User's expense.

ARTICLE VII — PATENT AND TECHNICAL DATA PROVISIONS

A. Patent Rights

1. Definitions

- a. "User" means the person or entity with which this Agreement is made.
- b. "Subject Invention" means any invention or discovery of the User conceived or first actually reduced to practice in the course of or under this Agreement, and includes any art, method, process, machine, manufacture design, or composition of matter, or any new and useful improvement thereof, or any variety of plants, whether patented or unpatented under the Patent Laws of the United States of America or any foreign country.
- c. "Facility Operator" means the operating Contractor which manages and operates the Government-owned, contractor-operated Facility where the work under this Agreement is to be performed.
- d. "Patent Counsel" means the DOE Patent Counsel assisting the User Facility Operator.

2. Rights of the User — Election to Retain Rights

- a. Subject to the provisions of paragraph 3 of this clause with respect to any Subject Invention reported and elected in accordance with paragraph 4 of this clause, the User may elect to obtain the entire right, title, and interest in any patent application filed in any country on a Subject Invention and in any resulting patent secured by the User. Where appropriate, the filing of patent applications by the User is subject to DOE security regulations and requirements.
- b. The User reserves an irrevocable, nonexclusive, paid-up license in each patent application filed in any country on a Subject Invention and any resulting patent in which the User does not elect to retain title or in which the Government acquires title.

The license shall extend to the User's domestic subsidiaries and affiliates, if any, within the corporate structure of which the User is a part and shall include the right to grant sublicenses of the same scope to the extent the User was legally obligated to do so at the time this Agreement was entered into. The license shall be transferable only with approval of DOE except when transferred to the successor of that part of the User's business to which the invention pertains.

3. Rights of the Contractor

If Contractor provides limited support services (which are intended to be non-collaborative) to the User and the Contractor employee makes any inventions or discoveries or generates other Intellectual Property, ownership will be governed by the provisions of Contractor's Prime Contract.

4. Rights of Government — Terms and Conditions of Waived Rights

The User shall promptly provide the Government with a copy of any patents issued on Subject Inventions.

5. Invention Identification, Disclosures, and Reports

The User shall furnish the Patent Counsel a written report containing full and complete technical information concerning each Subject Invention of the User within six months after conception or first actual reduction to practice, whichever occurs first, in the course of or under the Agreement, but in any event prior to any sale, public use or public disclosure of such invention known to the User. The report shall identify the Agreement and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains a clear understanding of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention. The report should also include any election of rights under this clause. When an invention is reported under this paragraph 4, it shall be presumed to have been made in the manner specified in Section (a) (1) and (2) of 42 U.S.C. 5908.

6. Limitation of Rights

Nothing contained in this patent rights clause shall be deemed to give the Government any rights with respect to any invention other than a Subject Invention, except as set forth in the Facilities License of paragraph 6.

7. Facilities License

In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this Agreement, the User agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries, regardless of when conceived or actually reduced to practice or acquired by the User, which at any time through completion of this

Agreement are owned or controlled by the User and are incorporated in the facility as a result of this Agreement to such an extent that the facility is not restored to the condition existing prior to the Agreement (a) to practice or to have practiced by or for the Government at the facility, and (b) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of the aforesaid rights and license shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

B. Patent and Copyright Indemnity - Limited

If and to the extent required by law, the User shall indemnify the Government and Contractor and their officers, agents, and employees against liability, including costs, for infringement of any United States patent or copyright arising out of any acts performed or directed by the User to be performed under the Agreement. Further, the foregoing indemnity shall not apply unless the User shall have been informed in a reasonable time by the Contractor or the Government of the suit or action alleging such infringement, and such indemnity shall not apply to a claimed infringement which is settled without the consent of the User unless required by a court of competent jurisdiction.

C. Rights in Technical Data – Use of Facility

1. Definitions

- a. "Technical Data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, demonstration, or engineering work to be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media, such as drawings or photographs, text in specifications or related performance or design type documents, or computer software (including computer programs, computer software databases, and computer software documentation). Examples of Technical Data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical Data, as used in this subpart, does not include financial reports, costs analyses, and other information incidental to contract administration.
- b. "Proprietary Data" means Technical Data which embody trade secrets, developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:
 - (i) are not generally known or available from other sources without obligation concerning their confidentiality;
 - (ii) have not been made available by the owner to others without obligation concerning their confidentiality; and
 - (iii) are not already available to the Government without obligation concerning their confidentiality.

- c. "Unlimited Rights" means rights to use, duplicate or disclose Technical Data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.
2. The Contractor and User will negotiate in good faith and agree on a meaningful list of research results and data generated during the work performed under this Agreement that will be released to the public.
3. The User agrees to furnish to DOE or the Facility Operator those data, if any, which are (a) related to the health and safety of personnel at the facility, or (b) necessary to operate the facility. Any data furnished to DOE or the Facility Operator shall be deemed to have been delivered with "Unlimited Rights" unless marked as "Proprietary Data" of the User. The Government and the Facility Operator shall not disclose properly marked Proprietary Data of the User outside the Government and the Facility Operator. The Government and the Facility Operator reserve the right to challenge the proprietary nature of any markings on data.
4. The Government shall have Unlimited Rights in any Technical Data (including Proprietary Data) which are not removed from the facility by the User on or before termination of the Agreement. The Government shall have Unlimited Rights in any Technical Data (including Proprietary Data) which are incorporated into the facility or equipment under the Agreement to such extent that the facility or equipment is not restored to the condition existing prior to such incorporation.
5. The following legal notice shall be affixed to each report or publication resulting from this Agreement which may be distributed by the User:

DISCLAIMER NOTICE

This document was prepared by _____, as a result of the use of facilities of the U.S. Department of Energy (DOE) which are managed by (Name of Contractor). Neither (Name of Contractor), DOE, or the U.S. Government, nor any person acting on their behalf: (a) makes any warranty or representation, express or implied, with respect to the information contained in this document; or (b) assumes any liabilities with respect to the use of, or damages resulting from the use of any information contained in the document.

D. Notice and Assistance Regarding Patent and Copyright Infringement.

1. The User shall report to the Government, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this Agreement of which the User has knowledge.
2. In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this Agreement or out of use of any supplies furnished or work or services performed hereunder, the User shall furnish to the Government, when requested by the Government, all evidence and information in possession of the User pertaining to such suit or claim. Such evidence and information

shall be furnished at the expense of the Government except where the User has agreed to indemnify the Government.

ARTICLE VIII — LIABILITY

- A. Neither the Government, DOE, the Contractor, nor persons acting on their behalf will be responsible for any injury to or death of persons or other living things or damage to or destruction of property or for any other loss, damage or injury of any kind whatsoever resulting from the furnishing of facilities, equipment, material, information or personnel under this Agreement, and not directly resulting from the sole fault or negligence of the Government, DOE, the Contractor, or persons acting on their behalf.
- B. Neither the Government, DOE, the Contractor, nor persons acting on their behalf will be responsible, irrespective of cause, for failure to furnish the facilities, equipment, material, information or personnel under this Agreement at any particular time or in any particular manner or any failure of the Contractor to protect information and/or information systems from unauthorized access.
- C.
 - 1. If, and to the extent permitted by law applicable to the User, and except for any liability resulting from any negligent or intentional acts or omissions of the Contractor, the User indemnifies the Government and the Contractor for all damages, costs and expenses, including attorneys' fees, arising from personal injury or property damage occurring as a result of the making, using or selling of a product, process or service by or on behalf of the User, its assignees or licensees, which was derived from the work performed under this Agreement. In respect to this Article, neither the Government nor the Contractor shall be considered assignees or licensees of the User, as a result of reserved Government and Contractor rights. The indemnity set forth in this paragraph shall apply only if the User shall have been informed as soon and as completely as practical by the Contractor and/or the Government of the action alleging such claim and shall have been given an opportunity, to the extent afforded by applicable laws, rules, or regulations, to participate in and control its defense, and the Contractor and/or the Government shall have provided reasonably available information and reasonable assistance requested by the User. No settlement for which the User would be responsible shall be made without the User's consent unless required by final decree of a court of competent jurisdiction.
 - 2. If, and to the extent permitted by law applicable to the User, the User agrees to indemnify and save harmless the Government, DOE, the Contractor, and persons acting on their behalf from any costs and expenses resulting from loss, damage, destruction, misuse or alteration to or of property of the U.S. Government to the extent that such loss, damage, destruction or alteration is caused or contributed to by the intentional or negligent act of User or its employees or representatives.
- D. The foregoing provisions of this Article VIII shall have no application to public liability for nuclear incident as defined and provided for in the Atomic Energy Act of 1954, as amended, compensation for which shall be in accordance with such law.

ARTICLE IX — EXPORT CONTROLS

- A. User hereby acknowledges notice that the export of goods and/or Technical Data from the United States may require some form of export control license from the U. S. Government and that failure to obtain such export control license may result in criminal liability under the laws of the United States.
- B. User acknowledges its responsibilities, as a condition precedent to this agreement, to be bound by an Export Control agreement, if applicable, (to be incorporated as an attachment to Appendix A pertaining to the specific User Facility and project).

ARTICLE X — ENTIRE AGREEMENT

It is expressly agreed by the parties hereto that this Agreement constitutes the entire and only Agreement between the parties with respect to the subject matter herein; and that this Agreement cannot be amended nor any provision thereof waived except by an instrument in writing and duly executed on behalf of each of the parties hereto by the duly authorized representative of each party.

ARTICLE XI — TITLE AND ADMINISTRATION

It is understood and agreed that this Agreement is entered into by the Contractor for and on behalf of the Government; that the Contractor is authorized to and will administer this Agreement in other respects for DOE, unless otherwise specifically provided for herein; that administration of this Agreement may be transferred from the Contractor to DOE or its designee, and in case of such transfer and notice thereof to the User, the Contractor shall have no further responsibilities hereunder.

ARTICLE XII — TERMINATION

Either party hereto may terminate this Agreement for any reason at any time by giving not less than thirty (30) days' prior written notice to the other party. The Contractor reserves the right to immediately cancel this Agreement without regard to the aforesaid written notice when cancellation of this Agreement is determined to be necessary to the national defense and security of the United States. Such termination shall only affect the term of this Agreement, and shall otherwise be without prejudice to the rights of the parties hereunder which may have previously accrued.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day, month, and year first above written.

FOR USER

FOR CONTRACTOR

BY: _____

BY: _____

NAME (typed): _____

NAME (typed): _____

TITLE: _____

TITLE: _____

DATE: _____

DATE: _____